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Abstracting

RECOGNITION OF NEW STATES: KOSOVO CASE

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Abstract

The recognition of Kosovo is an issue in some part of the international community even though its independence has been recognized by 116 states and that the ICJ has given a legal opinion which confirmed that the independence was not a violation of international law. This paper analysis the pros and cons and the difficulties created by the non-recognition of Kosovo both for the region and broader, dealing not only with the political reasons and difficulties. The paper is written by using combined methodology and methods: systemic analysis, of legal analysis, and method of comparison analysis. Conclusions and recommendations are expected to be a contribution towards a further debate about the importance of the recognition of the state of Kosovo.

Keywords: independence, declaration, Kosovo, state, international community

INTRODUCTION

The term state was heard in the history as new states were created, and in the meantime others disappeared. Some were occupied for a short or a long period of time. Others were colonized and then decolonization appeared (Rahmani 2015). The international community deals with the issue when the state appears factually. It is not important in which way the state was created: whether it was created in accordance with the exiting internal or international order (Gruda 2007, 71-72). When a state appears factually, then it is considered that there is a starting point for a judicial fettle. Related to how the state is defined there are many theories and thoughts whereas "the state is a type of legal person recognized by international community." (Brownlie 2003, 69).

The Kosovo Declaration of independence was adopted by the Kosovo Parliament on February 17, 2018. Thus the international recognition of Kosovo is a request since its independence, and also an objective of the Kosovo state structures. The recognition went through some waves. The first wave was realized very quickly. Essentially, this one was the most important, because Kosovo was recognized by the most important Western states such as the USA, the United Kingdom, France, Germany, Italy, etc. Then the process faced obstacles and some stagnation which made the process slow down. The recognition of a state has a political and economic importance and the effects of the recognition are quite crucial.

Since the open request for recognizing Kosovo, Kosovo addressed by Kosovo regarding the recognition, the states could be divided in the following groups: states that reacted immediately and recognized Kosovo; states that hesitated at first then changed their attitude and states that are declared to be against the recognition of Kosovo (Rahmani 2015).

DEFINITIONS OF RECOGNITION

It is clear that the problem of recognition of states and governments has not ensured satisfaction in theory and in practice. Many efforts were made in order to adopt the constitutive theory. Lauterpacht maintained, for example, that once the conditions prescribed by international law for statehood have been complied with, there is a duty on the part of existing states to grant recognition. This is because, in the absence of a central authority in international law to assess and accord legal personality, it is the states that have to perform this function on behalf, as it were, of the international community and international law (Lauterpacht 1947, cited by Shaw 2003, 372-373). Vis-à-vis the constitutive theory stands the declarative theory on state recognitions. Practice regarding recognitions of states during the XX Century suggests that recognition plays more than a role of evidence (Grant 1999, 22). The declarative theory has an opposite

approach and is a little bit more in accordance with the practical realities. This holds the attitude that recognition is mainly acceptance of a situation that actually exists. A new state will acquire capacity in international law not by virtue of the consent of others but by virtue of a particular factual situation (Shaw 2003, 369). Unrecognized states are quite commonly the object of international claims, charges of aggression, and other breaches of the UN Charter, by the very states refusing recognition (Brownlie 2003, 87).

The declarative theory is more legitimate and more responsive to the requests and the international reality. With its recognition, a state declares that according to its opinion, new state fulfills conditions of statehood, which international law prescribes (Gruda 2007, 79). But there is also an important opinion according to which "actual practice leads to a middle position between these two perceptions" (Shaw 2003, 369). Recognition is simply an act of discretion of an individual state to recognize or to reject the new state. Thus, recognition is a simply political act comprised by a state's decision on recognizing or not recognizing other state an act which is a simply and this has not to do with the arbitrary act of a determined state.

The recognition consists of various forms. Amongst the most mentioned are *de facto* and *de iure* recognitions. Division into these forms has no determined character because the international law has no clear norms related to this. *De facto* recognition is not a complete recognition and it is a temporary one. A state that at accords *de facto* recognition shows in this way its desire to enter into limited, incomplete, and unsustainable relations with the new state relations because of the stance that the new state is not well consolidated. If the new state is not able to prove itself and disappears, the state which has done *de facto* recognition revokes it (Puto n.d., 177). *De facto* recognition involves a hesitant assessment of the situation, an attitude of wait and see, to be succeeded by *de jure* recognition when the doubts are sufficiently overcome to extend formal acceptance (Shaw 2003, 382). *De iure* recognition is considered to be a complete recognition. A state which accords this type of recognition expresses this through a formal act and in principle this is an unrevoked recognition. Nonetheless, in the political sense recognition of either kind can always be withdrawn: in the legal sense it cannot be unless a change of circumstances warrants it (Brownlie 2003, 91). In the modern international law the tendencies of removal of the differences between two recognitions are noted, because the use of *de facto* recognition has made possible appearance of bargaining on recognition or rejection of the new states. To new states there are set up preconditions (conditional recognition) which they have to fulfill before the recognition is granted. In the process of Declaration of independence and the recognition of states (including the Kosovo case) we will find classical, modern and post-modern approaches within the international community (Rahmani and Belegu 2013, 159-160).

Supporters of the classic approach on self-determination oppose Kosovo's right of self-determination with the justification that the process of self-determination has been finished with the end of the decolonization and Kosovo was not a colony. The content of international law about the self-determination traditionally was limited to the situation of decolonisation. During the process of dissolution of Yugoslavia the right of self-determination broadened to a clear non-colonial context (Castellino 2000 as cited in Ryngaert and Sobrie 2011, 19). This is because the international law could not remain constantly static and unchangeable. On the other side the right of self-determination of the people of Kosovo is opposed in the basis of the judicial constructions from the Yugoslav Constitution, according to which only nations and nationalities have the right of self-determination. According to them the international law, the right of self-determination is given to nations and republics only. According to this interpretation, Kosovo Albanians would have the right of internal self-determination, but not the right of external self-determination. Some arguments against the Kosovo independence underline that Kosovo had no right to exercise the right of self-determination as the republics had. However, it should be noted that republics did not expressly have this right since this right did not rely on the territory. The argument relies on the differences between "constitutive" nations and "non-constitutive" ones and nationalities (*narodnosti*). This principle actually was not adequate and it was fluid, thus consequently counterproductive and this is seen from the Serbian pretensions to gain within its territories parts of Croatia and other parts of Yugoslavia. Consequently, this was not taken seriously by "constitutive" nations when they had minorities in any other republic (KIPRED 2007, 7).

A state is a factual creature and only when it fulfills determined conditions we can talk about its international subjectivity, whereas it could occur by secession, by an agreement, and also through the process of dissolution of an entity as it was the case with the former Yugoslavia, etc. New norms of international law ease the process of arguing the statehood and thus they call on creation of new criteria and especially norms needed to deal with the cases of secession of states from the systems being dissolute. And norms, categories and the norms of moral are various. After all, the NATO intervention in Kosovo shows "an increasing consensus regarding existence of an unaccepted gap between what is the international law and that of what moral requires" (Buchann, as cited in Holzgrefe and Keohane 2003, 130).

The European Community has issued The Declaration on Yugoslavia by which the community and the Member States agree to recognize Yugoslav republics only when they fulfill some determined conditions. If these republics requested recognition, the conditions to be fulfilled were: acceptance of the Guidelines disposals of the Conference draft convention on Yugoslavia, especially human rights and national rights of ethnic groups; and support of the efforts of the UN Security Council and the

Conference on Yugoslavia. The community and the Member States have also requested Yugoslav republics that seek recognition to give constitutional and political guarantees in order to ensure that there will not be territorial claims to the neighboring states (Shaw 2003, 375). At this stage of development, Kosovo was treated differently, even though it requested international recognition.

SUI GENERIS CASE

The statement of the US Secretary of State in the occasion of Kosovo recognition given on February 18, 2008 reads:

Not an usual combination of factors are found in the situation of Kosovo – including the context of dissolution of Yugoslavia, the history of ethnic cleansing and crimes against civilians in Kosovo and an extended period under the UN administration – these are not found anywhere else, therefore this makes Kosovo special. Kosovo could not be seen as a precedent for any other situation in the today's world." (www.state.gov).

The declaration numbered factors naming them "unusual combination" and among other arguments, the history of ethnic cleansing which strengthens Kosovo's right on statehood. The projection of declaring the independence in order to crown the people's aspiration of Kosovo is not entirely unilateral. The essence to treat Kosovo as a special case emerges from the response of the international community and from the effective transformation of Kosovo in an internationalized territory (Stahn 2001, 531-540). The process of preparation for declaring independence, the date, and the scenario of declaring independence have been arranged in accordance with the international community, or differently said, with the key decision making factors.

In the case of Kosovo we should take into consideration that it is a *sui generis* case based on the specific circumstance that lead towards the Declaration of independence. These circumstances are the autonomous status of Kosovo in former Yugoslavia and later the systematic violation of human rights, the humanitarian catastrophe, the refusal of the Rambouillet Conference, etc. According to the UN Security Councils Resolutions, chapter VII of the UN Charter, despite the nine years of international administration, there was a lack of agreement between the key actors in order to ensure a sustainable level of autonomy for Kosovo, as well as lack of the responsibility for peace and stability in the region (Written Contribution of the Republic of Kosovo to ICJ 2009, 60-61).

When the independence of Kosovo the Kosovo is opposed, the term "unilateral declaration of (Kosovo's) independence" is usually used but the Declaration of independence was not a pure unilateral act. This act followed a series of coordinated

international acts and deeds to make Kosovo sui generis case that derives from the nonconsensual process of dissolution of Yugoslavia, and that is not a precedent for any other situation" (Kosovo Declaration of independence, 2008). Whereas the armed conflict and the war in Kosovo have ended and this was concluded with the international administration in Kosovo according to the UN Security Council Resolution 1244, Resolution 1244 has left open doors for all options from independence up to restoration of Serb power" (Gruda 2005). The coordinated Declaration of independence is a result of fulfillment of set conditions within Kosovo. Standards before status, the Kei Eide Report on evaluation of standards, negotiations mediated by UNOSEK and issuance of the Comprehensive Proposal for the Final Status (Ahtisaari Plan) are some of the main conditions that proved Kosovo's maturity for establishing the final statehood, which was recognized internationally.

The conditions and the obligations that were fulfilled by Kosovo have also proven the commitment to act continually in total accordance with all international acts, starting with the UN Charter. The independence and its declaration "was very interesting because no state in the Council except Russia and Serbia did not state that independence was an international illegal act that should be opposed by the organized international community, for example, through collective non-recognition policy or even through sanctions" (Weller 2011, 437).

The Declaration of independence was in accordance with the international law and this was confirmed by the International Court of Justice when it decided that "Kosovo's Declaration of independence was not in opposition with the international law". (ICJ 2018). By confirming that the international norms of the international law were not violated, the court treated the issue of the recognition of the state of Kosovo as a political issue (ICJ 2018) that should be treated individually by the states. This is a natural aftermath because recognition is a public act of one state – it is an optional and political act and the state has no legal obligations regarding this (Brownlie 2003, 89).

RECOGNITION AND THE REMEDIAL SELF-DETERMINATION

In favor of the Kosovo's right of statehood and in favor of that, that Kosovo had the right to declare independence is also a notion that today is known as "remedial self-determination". This doctrine comes in two variants: the lack of representation on one side, and repression on the other side (Weller 2011, 441). In the case of Kosovo under the Yugoslav Federation, most of the time the people of Kosovo were not represented and were treated as second hand citizens. Moreover, they were excluded from their rights. When the continual systematic violence and repression are added to this as well, it is clear that the right of self-determination, which belonged to Kosovo, was inevitable. The doctrine of the remedial self-determination is based on the general principle of

justice *ubi ius ibi remedium*. This means if self-determination is present, a solution and an instrument to exercise this right must be there to. An argument about the means is clearly illustrated by the words of Ryngaert and Griffioen:

What if a state persistently denies the fundamental rights from the internal self-determination? What if people cannot select freely and they are subject of violence and they endure huge violations of their basic rights, whereas all possible means for peaceful solution of the conflict are exhausted? Should we forbid this people to find choice for self – help in form of external self determination (Ryngaert and Griffioen, as cited in Vezbergaite 2011, 44).

The answer is automatic and logical: we cannot and there are no international norms that legalize and justify violence and oppression of others because they have different language, culture, origin, tradition, etc. And those who were under the systematic violence and who were excluded from their rights cannot be deprived of the right of remedial self-determination. And despite the fact that Kosovo with its constitution is established as a state of citizens, Albanians were always the majority and this is an additional argument to justify independence. It is now seen that the modern international law is not comprised of entirely static norms. This has entered into a process of changes that are affected by the situation within the international community as well. The international law has increased the number of international subjects in the same way it has also enriched the attitudes and the criteria with the possibilities of creating new states and their international recognition. Thus, some of the new criteria that are added to the international law are: the human rights and the level of democratic development, the feasibility of a state, to look differently from *ius cogens*, etc.

IMPORTANCE OF KOSOVO'S RECOGNITION

The recognition of Kosovo remains to be very important in terms of the economic and political impact. Two very important mechanisms of the international community have still not recognized Kosovo: the UN and the EU. Regarding the UN it is important to consider the following:

The recognition of a new State or Government is an act that only other States and Governments may grant or withhold. It generally implies readiness to assume diplomatic relations. The United Nations is neither a State nor a Government, and therefore does not possess any authority to recognize either a State or a Government.

As an organization of independent States, it may admit a new State to its membership or accept the credentials of the representatives of a new Government (UN 2018).

Analyzing this, we see clearly that the membership in the UN has to be fulfilling some specific conditions and to be undergoing through some concrete steps in regard to the procedure. In regard to the procedure it is as follows:

The State submits an application to the Secretary-General and a letter formally stating that it accepts the obligations under the Charter.

The Security Council considers the application. Any recommendation for admission must receive the affirmative votes of 9 of the 15 members of the Council, provided that none of its five permanent members — China, France, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America — have voted against the application.

If the Council recommends admission, the recommendation is presented to the General Assembly for consideration. A two-thirds majority vote is necessary in the Assembly for admission of a new State.

Membership becomes effective the date the resolution for admission is adopted (UN 2018).

Kosovo has still not reached the 2/3 of the General Assembly. Thus it is clearly seen how important is for Kosovo to ensure more recognitions. On the other side, the membership to the EU is quite different.

ECONOMIC IMPACT OF THE RECOGNITION OF KOSOVO

It is clear that the recognition of a state “can have concrete economic impacts” (Brookings 2018). The impact in this field varies and it is manifested in various forms. It could derive from technical components and it could be very substantial. A Kosovo businessman, for example, regardless of his economic strength faces difficulties to travel in the countries that do not recognize Kosovo. If a company from Kosovo intends to enter into the business relations with a company from the countries that oppose the recognition of Kosovo, then the both companies would find themselves in a quite difficult situation. This can be explained in the following manner:

Kosovo’s contested status creates challenges for its businesses, from difficulties of travel to complication in the exchange in goods and services. For example, until recently, Kosovo did not have a postal system. Instead, the Albanian postal service would receive post from abroad and

deliver it to Kosovo, making sending and receiving goods difficult. Money transfers were also problematic, as Kosovar banks have only recently been assigned the SWIFT codes that are needed for international transactions. Until this happened, firms used intermediary banks, a practice that meant additional administrative procedures, restricted availability of online transactions, and increased costs. Access to essential business services like postal delivery and money transfers is regulated by legal agreements that often make such services available only to states officially recognized by the U.N. The inability of businesses from Kosovo and other nations that are not universally recognized as states to access these services increases time and costs of trade and companies their ability to engage in international trade (Brookings 2018).


Regardless of gaps and the changes within the international community, etc., the Ministry of Foreign Affairs states that:

International recognition of the independence and sovereignty of Kosovo will remain a priority of the Ministry of Foreign Affairs. The process of Kosovo's recognition has shown that Kosovo is an irreversible reality and an essential factor to the peace and stability in the region (MFA – KS 2018).

CONCLUSIONS

The recognition of Kosovo by the international community is very important. The development of various activities remains a priority for the Government of Kosovo and especially for the Ministry of Foreign Affairs. Kosovo exists for ten year as an independent state. The process of Kosovo's recognition as an independent state has been initially intensive and Kosovo managed to gain recognition by almost all Western democracies. It was expected that the countries that did not recognize Kosovo, would have no hesitations to do so after the opinion of the International Court of Justice regarding the right of Kosovo of self-determination. By IJC opinion it was confirmed that Kosovo Declaration of independence was not a violation of the international law. However, this did not happen in fact. The process of Kosovo's recognition is facing stagnation. The reasons for this vary. They can be categorized as internal and external. Internal are those that are basically related to the capacities of the state organs to work more effectively. International are those related to the states that oppose the recognition of Kosovo and other states not to recognize Kosovo as well. Serbia has proven itself as very active in the lobbying against the recognition of Kosovo. The institutions authorized to lobby for recognition by as many states as possible did not the

opinion of the ICJ regarding Kosovo's Declaration of independence as needed. While lobbying, this opinion should have been used more and therefore better presented to the countries that hesitate to recognize Kosovo. The process of negotiations with Serbia in Brussels is something that might have slowed down the process of recognitions. This is because a perception (this needs to be studied more deeply) that countries wait for the final agreement between Serbia and Kosovo. In some cases there was not enough and proper coordination between the Kosovo institutions that are compete to deal with the foreign policy. The coordination in some cases was not well organized even when Kosovo had to deal with the so called "homework activities". For example, the case regarding the demarcation of the border with Montenegro, which was set as a condition to be fulfilled so Kosovo citizens could enjoy visa-free regime. The lack of qualified diplomatic staff is also something that Kosovo still faces. The dialogue between Kosovo and Serbia facilitated by the EU has indirectly slowed down the recognition process since some non-European states may wait until the negotiations end. This is because of the created perception that something could change. Serbia especially lobbied in order to convince these states not to recognize Kosovo. Of course, Russia's refusal to recognize Kosovo has also at least indirect impact on the determined states.

The Kosovo institutions should urgently evaluate the process of recognition in order to find out the main obstacles that seem to stand in its way. The clear division of duties should be more precise within the country in terms of determining who is more responsible to deal with lobbying. A special task force within the Ministry of Foreign Affairs that would work on the recognition process may be a good mechanism that can help this ministry. The composition of this task force should be combined on national and international level. Basically, members of this task force should be diplomats of career, as well as academicians. Their work should be continual and intensive. They can produce reports, analysis, and they can come up with proposals for the ministry. Countries as Macedonia, Croatia, Montenegro, Albania, and Slovenia can serve quite well in the world arena, convincing other state that the recognition of Kosovo contributes to the peace and the stability. These countries' diplomats could be great and helpful mechanisms. Kosovo should be very proactive in working with these countries by developing joint activities and promoting cooperation and peace in the region. Kosovo should find all possible ways to be present in all events, i.e. events with regard to education, science, business, etc., organized by the states that did not recognize Kosovo, so the Kosovo representatives may address and reach their governments and public as well. 

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